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Coffman v. West Virginia Board of Regents: A Case of Handicap Discrimination, No Transfer Required

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COFFMAN v. WEST VIRGINIA BOARD OF REGENTS: A CASE OF HANDICAP DISCRIMINATION, NO TRANSFER REQUIRED

I. INTRODUCTION

The West Virginia Human Rights Act declares that equal opportunity should be the civil right of every citizen of West Virginia, regardless of race, religion, color, national origin, ancestry, age, blindness or handicap.[1] Equal opportunity is founded upon the inherent right of all people to the "means of acquiring and possessing property"[2] guaranteed by the West Virginia Constitution. "The Human Rights Act breathes life into these constitutional provisions which mandate equal opportunity . . . ."[3] The Act was adopted in 1967; handicap was added to the list of traits when the Act was amended in 1981.[4]

However well-intentioned, handicapped rights legislation is not necessarily working to protect those rights in the area of employment. While the goals of legislators have been loftily stated, the

1. W. VA. CODE § 5-11-2 (1987).
2. W. Va. Const. art. III, § 1.
3. Allen v. State Human Rights Commission, 324 S.E.2d 99, 109 (W. Va. 1984).
4. 1981 W. Va. Acts, ch. 128.

courts have often been reluctant to apply these laws in a way which achieves the goal of equal opportunity found in both the Federal Rehabilitation Act and in many state statutes.[5] Federal and state courts are divided between favoring employee rights or eschewing employer burdens; courts either favor the employee by shifting the burden of proof to the employer once a *prima facie* case of discrimination is established, or favor the employer by allowing any showing of unreasonableness of the proposed accommodation to overcome the employer's duty to accommodate the handicapped employee.[6]

In *Coffman v. Board of Regents*[7] the West Virginia Supreme Court of Appeals gave its first interpretation of the West Virginia Human Rights Act as it applies to handicapped employment discrimination. This comment examines that decision and the standard to be applied in handicapped employment discrimination cases.

II. Statement of the Case

This case originated in Monongalia County Circuit Court. The plaintiff, Dorothy Coffman, was employed by West Virginia University Hospital as a Custodian I.[8] She injured her back in October 1980 while emptying garbage cans at the hospital. Over the following months Coffman suffered from back pain sufficient to interfere with her ability to perform her duties at work.[9] Coffman did not work the month of July 1981, during which time she received temporary

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5. Note, *After Carr: Rehabilitating the Michigan Handicappers' Statute*, 33 Wayne L. Rev. 1133, 1135-38 (1987). This article divides states' handicapped rights statutes into four categories: those similar to Alabama's which consists of a general declaration against discrimination and provides for no cause of action; those similar to Michigan's which declares freedom to work without discrimination, but provides protection only if the handicap is unrelated to job performance; those similar to Connecticut's which bifurcates handicap and ability to perform, allowing the employer to exclude only if it is a *bona fide* occupational qualification; and the California group, which gives the clearest definition of handicap, places a duty on the employer to accommodate, and allows exceptions for *bona fide* occupational qualifications, undue hardship, and safety concerns.

6. Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness* Harv. L. Rev. 997 (1984).

7. Coffman v. W. Va. Board of Regents, No. 17904, slip op. (W. Va. June 2, 1988).

8. Custodian I is a generic job description utilized not only at WVU Hospital but throughout the university. *Coffman*, No. 17904 at 7 (Miller, J., dissenting) (The dissenting opinion at the slip opinion is paginated separately and begins with 1).

9. *Id.* at 1.

total disability benefits from Workers' Compensation.[10] She returned to work in August 1981 but continued to suffer from back pain. Coffman was assigned to do "high work," consisting of such duties as cleaning windows and dusting, in a unit position with another custodian doing the "low work" such as floors and garbage.[11] In a letter dated January 14, 1982, Coffman's supervisor notified her that she would be terminated on January 25, 1982, unless another position was found for her. No position was available, and Coffman was discharged on January 25, 1982.[12]

Coffman filed a complaint on January 24, 1984, in the circuit court of Monongalia County charging that she had been wrongfully discharged in violation of the handicapped rights provision of the Human Rights Act, chapter 5, article 11, section 9 of the West Virginia Code (hereinafter W. Va. Code). The case was tried before a jury in November 1986; the jury returned a verdict in favor of Coffman and awarded her $55,600 in damages.[13]

The West Virginia Board of Regents (Regents) appealed and argued that the trial court erred in submitting the question of reasonable accommodation to the jury because Coffman was not a qualified handicapped person.[14] The West Virginia Supreme Court of Appeals (Court of Appeals) rejected this argument, but held in favor of the Regents. The court stated that reasonable accommodation does not include a duty to "create a new position" or to transfer, and reversed the trial court for ruling otherwise.[15]

III. Prior Law

Because *Coffman* is the first interpretation of the West Virginia Human Rights Act, there is no prior West Virginia case law. Instead, the Supreme Court of Appeals relied on the similarity of the West Virginia Human Rights Act and the Federal Rehabilitation Act[16] to decide this case.

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10. *Id.*
11. *Id.* at 3.
12. *Id.*
13. *Id.*
14. *Id.* at 3-4.
15. *Id.* at 13.
16. *Id.* at 8.

The civil rights of handicapped persons were first addressed by Congress in 1973 when it passed the Federal Rehabilitation Act.[17] This was nine years after the Civil Rights Act of 1964 and a year after Congress addressed sex discrimination in Title IX (1972). In modeling the Federal Rehabilitation Act after the Civil Rights Act, Congress intended to prevent discrimination against and to extend equal opportunity to handicapped persons as a protected class.[18] The Rehabilitation Act governs employment by the federal government, hiring by federal contractors, and treatment in federally funded programs, as well as accessibility of public places.[19]

The West Virginia Human Rights Act extends this protection of equal opportunity to all handicapped citizens of West Virginia. The Act provides that "[i]t shall be an unlawful discriminatory practice . . . [f]or any employer to discriminate against an individual with respect to . . . employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped."[20] Thus, the West Virginia Human Rights Act adds a bona fide occupational qualification exemption which is absent in the Federal Rehabilitation Act.[21] The state regulations promulgated by the Human Rights Commission to implement the handicap provisions of the Act became effective August 1, 1982.[22] These regulations define "handicap" and impose a duty to provide reasonable accommodation on the employer.[23]

The definitional language of the federal and West Virginia enacting legislation is virtually identical. A handicap is defined as "any physical or mental impairment which substantially limits one or more of a person's major life activities," which includes employment.[24] A "qualified handicapped person" is "one who is able and com-

17. 29 U.S.C. §§ 701-794 (1982).

18. Comment, *The Discrimination Statutes and the Supreme Court's "Program" for Confusion: Consolidated Rail Corp. v. Darrons; Grove City College v. Bell; North Haven Board of Education v. Bell*, 17 CONN. L. REV. 629, 633-34 nn.16 & 19 (1985).

19. M. BERKOWITZ & M. HILL, DISABILITY AND THE LABOR MARKET, 501-04 (1986).

20. W. VA. CODE § 5-11-9(a) (1987).

21. *Id.*

22. *Coffman*, No. 17904 at 4 n.4.

23. 77 C.S.R. 1 §§ 4.2, 4.3(a) (1987).

24. 77 C.S.R. 1 §§ 3, 2.1 (1987); *see also* 45 C.F.R. 84.3(j) (1987).

petent, with reasonable accommodation, to perform the essential functions of the job in question."[25] Finally, reasonable accommodation includes "adjustments or modifications to the work assignment or work environment to enable a handicapped person to fulfill employment responsibilities."[26] This legislation and its definitions provide the framework for analysis of a handicap employment discrimination case.

IV. ANALYSIS

In *Coffman* the Board of Regents argued on appeal that Coffman was not a "qualified handicapped person" and therefore not entitled to protection under the Human Rights Act. The Board's theory was that in order to be qualified, Coffman must be able to perform the essential duties of her position *without* reasonable accommodations. The Supreme Court of Appeals rejected this theory and relied instead on the state regulations, which say that "a qualified handicapped person is 'one who is able and competent, *with reasonable accommodation*, to perform the essential functions of the job in question.' "[27] The court seemed to adopt the United States Supreme Court standard for review of the Federal Act, which was established in *School Board of Nassau County, Florida v. Arline*.[28] Under *Arline*, the questions to be addressed are whether the plaintiff is a "handicapped person" under the Act,[29] and if so, whether she is "otherwise qualified." The latter question is answered by assessing whether she can perform the "essential functions" of her position with "reasonable accommodation."[30] Finally, the court must consider whether the accommodation imposes undue hardship on the employer.[31]

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25. 77 C.S.R. 1 § 4.2 (1987); *see also* 45 C.F.R. 84.3(k)(1) (1987).

26. 77 C.S.R. 1 § 4.3(a) (1987); *see also* 29 C.F.R. 1613 704(b)(2) (1987).

27. *Coffman*, No. 17904 at 6 (quoting 77 C.S.R. 1 § 4.2 (1987)) (emphasis supplied by the Court). The application of the regulations in *Coffman* was at best inconsistent. The circuit court did not apply the regulations. *Id.* at 2. The Supreme Court of Appeals used the regulations when they supported the court's opinion. *Id.* at 4 n.4.

28. School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987); *Coffman*, No. 17904 at 6 n.8.

29. *Arline*, 107 S. Ct. 1123, 1125.

30. *Id.* at 1131 n.17.

31. *Id.*

A. The Handicap Defined

In order to be protected under the Act, an individual's handicap must be within the meaning of handicap in the applicable regulations. These define handicap as "any physical or mental impairment which substantially limits one or more of a person's major life activities."[32] Mere existence of an impairment is not enough; it must be shown to affect a "major life activity," which includes employment.[33] The language of the regulations allows some flexibility for the court applying them to a particular case.[34] While many physical impairments such as hearing loss, knee injuries, visual impairment and epilepsy have been found to be covered handicaps,[35] others such as left-handedness, chronic lateness and excessive weight have not been accepted by the courts.[36]

In *Arline* a teacher claimed that a disease, tuberculosis, caused her handicap.[37] The United States Supreme Court looked at how the disease had affected her life—frequency of occurrence, hospitalization, and absence from work—to determine whether the impairment limited a major life activity.[38] The court found that tuberculosis had affected Arline's ability to work and held that the disease caused her to be handicapped within the meaning of the regulations.[39]

In deciding *Coffman*, the Supreme Court of Appeals did not address the question of whether the plaintiff's impairment was a handicap. While portions of the record cited throughout the opinion indicate that Coffman's back injury did affect her employment (a major life activity),[40] the court did not address whether Coffman

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32. 77 C.S.R. 1 § 2.1 (1987); 45 C.F.R. § 84.3 (j) (1987).

33. 77 C.S.R. 1 § 2.5 (1987); 45 C.F.R. 84.3 (j)(2)(ii) (1987).

34. Note, *supra* note 6, at 999.

35. Southeast Community College v. Davis, 442 U.S. 397 (1979); Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986); Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).

36. De Torres v. Bolger, 781 F.2d 1134 (5th. Cir. 1986); School Dist. of Philadelphia v. Friedman, 96 Pa. Commw. 267, 507 A.2d 882 (1986); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

37. *Arline*, 107 S. Ct. at 1125.

38. *Id.* at 1127.

39. *Id.*

40. *Coffman*, No. 17904 at 1-3.

was handicapped because neither party challenged the finding on appeal.[41] The court merely defined handicap under the regulations and continued its analysis by proceeding to the next question, which was whether Coffman was "otherwise qualified" and entitled to protection under the West Virginia Human Rights Act.[42]

B. "Otherwise Qualified" Defined

Handicap alone does not qualify as a protected trait in employment discrimination. In order to be entitled to equal opportunity protection, the handicapped person must also be "otherwise qualified."[43] This is defined by the regulations as being able to perform the essential functions of the position with reasonable accommodation.[44]

To determine whether the handicapped person is otherwise qualified, two questions must be answered: 1) what are the "essential functions" of the position, and 2) what reasonable accommodation might enable the handicapped person to perform these essential functions.[45]

1. Determining Essential Functions

The first United States Supreme Court interpretation of essential functions was *Southeast Community College v. Davis*, in which a deaf nursing student challenged her exclusion from a federally-funded nursing program.[46] While holding that Davis was not entitled to protection because she could not meet all of the program's requirements,[47] the court stated in *dicta* that "situations may arise where a refusal to modify . . . might become unreasonable and discriminatory."[48] The response of the lower courts to *Davis* has been di-

41. *Id.* at 13 n.16.
42. *Id.* at 4.
43. *Davis*, 442 U.S. at 405.
44. 77 C.S.R. 1 § 4.2 (1987).
45. *Id.*
46. *Davis*, 442 U.S. at 397.
47. *Id.* at 406.
48. *Id.* at 412-13.

vided. Some courts have followed the holding, have required all the essential functions to be met, and have thus limited the affirmative duties to the handicapped.[49] Others have limited the holding to the facts of *Davis* and have followed its *dicta* by allowing for a "zone of marginal incapacity which the employer must either tolerate or accommodate."[50] This view gives more flexibility to oblige the handicapped.

The United States Supreme Court did not clarify this duality when it decided *Arline* because the case was remanded on the question of whether Arline was "otherwise qualified."[51] The Court did give some guidelines. It required an individualized inquiry into the possible contagiousness of the disease.[52] While the Court noted that under *Davis* the handicapped person must meet "all the requirements," it tempered this in the employment context by noting that the lower court must consider whether reasonable accommodation by the employer would enable the handicapped employee to perform the essential functions of the job.[53]

In examining the essential duties in *Coffman*, the Supreme Court of Appeals listed the duties of a Custodian I in a footnote. These include sweeping, mopping and scrubbing, cleaning bathrooms, removing garbage, changing beds, setting up chairs and displays, removing snow and ice and requisitioning materials.[54] Although the record indicated that the job description of a Custodian I "was intended to serve as a generic . . . design of all Custodian I Light Duty positions throughout the university . . . [and] was not a position description specifying the individual duties" that each Custodian I must fulfill,[55] the court found that anything less than all the listed duties would not fulfill the essential functions requirement.[56] Thus, Coffman's ability to perform only the "high work"

49. Note, *supra* note 6, at 1009 n.76.
50. *Id.* at 1009 n.77, 1011.
51. *Arline*, 107 S. Ct. at 1131.
52. *Id.*
53. *Id.* at 1131 n.17.
54. *Coffman*, No. 17904 at 7-8 n.9.
55. *Id.* at 7 (Miller, J., dissenting).
56. *Id.* at 11.

led to a failure to meet all the essential functions.[57] This interpretation closely resembles *Davis*.

The dissent in *Coffman* relied on two cases which follow the *dicta* of *Davis*. The first case, *Simon v. St. Louis County, Missouri*, involved a police officer's challenge of his dismissal after a gunshot wound left him partially paralyzed.[58] The *Simon* court stated that the essential functions as interpreted by the United States Supreme Court in *Davis* should be the "*legitimate* physical requirements" of the position.[59] Due to evidence that the police department's requirements were not all necessary or required of all officers, the court remanded for further finding of whether Simon could perform the essential functions of the desk job he was assigned.[60]

The second case, *Ackerman v. Western Electric Co., Inc.*, was a challenge by an asthmatic installer to dismissal because of health restrictions on her job performance.[61] The *Ackerman* court's analysis of the specific duties of an installer revealed that, because of lifting and dust restrictions, the employee was unable to perform 11.5% of her required duties.[62] However, because of the nature of the work crew, reassignment of this portion of her duties was reasonable accommodation.[63] Her ability to perform 88.5% of the essential duties was sufficient to meet the "otherwise qualified" requirement.

Following the *dicta* in *Davis*, the dissent to *Coffman* would find the essential functions requirement to be met, either as in *Simon*, by looking only to the essential functions of the "high work" position (a voluntary accommodation by the employer),[64] or as in *Ackerman*, by allowing part of the essential duties to be transferred to another person in the crew.[65]

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57. *Id.* at 12.

58. Simon v. St. Louis County, Mo., 656 F.2d 316, 318 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

59. *Id.* at 320 (citing *Davis*, 442 U.S. at 406).

60. *Id.* at 321.

61. Ackerman v. Western Electric Co., Inc., 643 F. Supp. 836 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (912 Cir. 1988).

62. *Id.* at 845-46.

63. *Id.* at 847-48.

64. *Coffman*, No. 17904 at 7 (Miller, J., dissenting).

65. *Id.*

2. Reasonable Accommodations

The second step in deciding whether a handicapped person is "otherwise qualified" is to determine whether any reasonable accommodation would enable him or her to perform the essential functions of the position. The West Virginia regulations define "reasonable accommodation" as adjustments or modifications to the work assignment or work environment to enable a handicapped person to perform the essential functions.[66] These adjustments include 1) making the work area accessible, 2) modifying equipment, 3) restructuring the job and modifying work schedules, 4) training, 5) adaptive aides and 6) educating other employees to adjust to the handicapped employee.[67]

Unfortunately, the United States Supreme Court has offered little guidance on reasonable accommodation. In *Davis* the Court held that no accommodation need be made because Davis could not meet all of the requirements of the program and therefore was not "otherwise qualified."[68] *Arline* was remanded for further findings of fact to determine whether the employee could be accommodated.[69] However, the *Arline* Court did offer some guidance in a footnote:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.[70]

This footnote has been interpreted by the federal courts to either prohibit or require transfer as a part of reasonable accommodation.

The discussion of reasonable accommodation by the West Virginia Supreme Court of Appeals in *Coffman* is also limited to a footnote.[71] The court noted Coffman's restrictions in bending and lifting and concluded that "[w]hile modifications such as long-han-

66. 77 C.S.R. 1 § 4.3 (1987).
67. *Id.*; 29 C.F.R. § 1613.704(b) (1987).
68. *Davis*, 442 U.S. at 407.
69. *Arline*, 107 S. Ct. at 1131.
70. *Id.* at 1131 n.10.
71. *Coffman*, No. 17904 at 8 n.10.

dled tools may have enabled Coffman to perform duties which required bending, we cannot envision, and Coffman has not suggested, any type of reasonable modification which would have accommodated her lifting restrictions."[72] The Supreme Court of Appeals then examined the unit position (in which Coffman performed the "high work" while a partner performed the "low work") from which Coffman was dismissed. The court concluded that this position was a transfer[73] and proceeded to question whether reasonable accommodation includes a duty to transfer. The court did not address the fact that the reassignment to the unit position was voluntarily made by the hospital to accommodate Coffman's restrictions.[74] The Supreme Court of Appeals also overlooked the West Virginia regulation which imposes a higher duty to accommodate employees who become handicapped during the course of employment by allowing the accommodation to include alternative employment opportunities reasonably available under the employer's existing policies.[75] Under this regulation, Coffman should have been able to remain in the position in which the hospital last placed her. However, in the absence of West Virginia precedent, the court looked to federal decisions to determine whether a transfer should be considered a reasonable accommodation.[76] The court cited five decisions in which the handicapped employee alleged that the employer's duty to accommodate included either reassignment, rewriting job descriptions, or permanent transfer.[77] All the decisions said that there was no duty to transfer or reassign in order to provide reasonable accommodation for a handicapped employee.[78] The Supreme Court of Appeals adopted these cases as persuasive precedent and held that reasonable accommodation did not include a duty to transfer.[79] Be-

72. *Id.*
73. *Id.* at 8.
74. *Id.* at 3.
75. 77 C.S.R. 1 § 4.7 (1987).
76. *Coffman*, No. 17904 at 8.
77. Alderson v. Postmaster General, 598 F. Supp. 49 (W.D. Okla. 1984); Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985); Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (1987); Bento v. ITO Corp. of Rhode Island, 599 F. Supp. 731 (D.R.I. 1984); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987).
78. *Alderson*, 598 F. Supp. at 55; *Carty*, 623 F. Supp. at 1188; *Wimbley*, 642 F. Supp. at 486; *Bento*, 599 F. Supp. at 745; *Carter*, 822 F.2d at 469.
79. *Coffman*, No. 17904 at 11.

cause no other reasonable accommodation would enable Coffman to perform the essential functions of a Custodian I, the hospital did not violate the Human Rights Act in discharging her.[80]

In adopting this precedent, the Supreme Court of Appeals overlooked two problems. First, unlike *Coffman*, all five of the federal cases it cited involved a collective bargaining agreement which limited transfer to light duty for at least the first five years of employment.[81] Second, these cases do not represent the exclusive interpretation of the courts; there are other courts which have held that there is a duty to transfer under reasonable accommodation.[82] For instance, *American Federation of Government Employees, Local 51 v. Baker* involved five handicapped employees who were notified that they would be discharged after the employer instituted changes in job structuring which resulted in their inability to work up to requirements.[83] In this case the district court interpreted *Arline*'s *dicta* as creating an affirmative obligation of the employer to accommodate handicapped employees.[84] The employer was ordered to retain the employees until a rehabilitation specialist could select accommodations according to each employee's needs.[85]

While the *Coffman* decision is not unreasonable according to the precedent adopted by the Supreme Court of Appeals, it is not in line with the state regulation which applies to employees who become handicapped during the course of their employment.[86] Considering the regulations and the voluntary nature of the accommodation in question, the court should have required the hospital to show undue hardship in order to dismiss Coffman once the accommodation was made.

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80. *Id.* at 12.

81. *Carter*, 822 F.2d at 467; *Alderson*, 598 F. Supp. at 55; *Carty*, 623 F. Supp. at 1189; *Wimbley*, 642 F. Supp. at 487; *Bento*, 599 F. Supp. at 745.

82. Ignacio v. U.S. Postal Service, 30 M.S.P.R. 471 (Spec. Pan. 1986); Rhone v. U.S. Dept. of the Army, 665 F. Supp. 734 (E.D. Mo. 1987); Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986); American Fed'n of Gov't Employees, Local 51 v. James Baker, 677 F. Supp. 636 (N.D. Cal. 1987).

83. American Fed'n. of Gov't Employees, Local 51 v. James Baker, 677 F. Supp. 636 (N.D. Cal. 1987).

84. *Id.* at 638.

85. *Id.* at 639.

86. 77 C.S.R. 1 § 4.7 (1987).

3. Undue Hardship

Once a handicapped employee has established that he was dismissed despite being able to perform the essential functions of a position with reasonable accommodation, he has established a *prima facie* case of employment discrimination. The employer has one remaining defense—if he can show that the accommodation causes undue hardship or safety concerns he may overcome this duty to accommodate.[87] This is an affirmative defense which must be raised by the employer.[88]

Guidance from the United States Supreme Court is again only *dicta*. In *Davis* the Court suggested that accommodation is not reasonable if it imposes "undue financial and administrative burdens" on a grantee (referring to federal programs).[89] In *Arline* the Court cited *Davis* on the issue of undue hardship[90] and suggested that safety factors must be considered when the employer is subject to public health regulations.[91]

Other lower courts have addressed this affirmative defense. In *Foods, Inc. v. Iowa Civil Rights Commission*[92] the employer alleged that he discharged an epileptic cafeteria employee because of safety concerns in operating equipment such as deep fryers and meat slicers. After closely examining the facts, the Iowa court found that while employees were required to be able to perform a variety of functions, the discharged employee's actual position did not include any of the alleged dangerous activities. Therefore, employee safety was an insufficient defense.[93] The *Ackerman* case addressed both the safety and undue hardship defense.[94] The employer alleged that because of the employee's asthma, it was hazardous to allow her to work in high dust conditions.[95] The court found that these con-

87. 77 C.S.R. 1 §§ 4.4, 4.3(b) (1987); 29 C.F.R. 1613.704(a) (1987).
88. 77 C.S.R. 1 § 4.9 (1987).
89. *Davis*, 442 U.S. at 412.
90. *Arline*, 107 S. Ct. at 1131 n.17.
91. *Id.* at 1131-32.
92. Foods, Inc. v. Iowa Civil Right Comm'n, 318 N.W.2d 162 (Iowa 1982).
93. *Id.* at 169.
94. *Ackerman*, 643 F. Supp. at 848, 851.
95. *Id.* at 848.

ditions were not common and that a paper mask (suggested by the employee's physician) would eliminate the danger.[96] The employer also alleged that the reassignment of 11.5% of the employee's duties would impose undue hardship.[97] Absent evidence to support this claim, the court also struck down this defense.[98]

Undue hardship was not addressed by the West Virginia Supreme Court of Appeals in *Coffman*. The court held that, because Coffman was unable to perform the essential functions of a Custodian I, the hospital did not violate the Act.[99] Coffman was, therefore, unable to establish a *prima facie* case and the burden did not shift to her employer to show undue hardship to overcome the duty to accommodate. No balancing of undue hardship was required to reach this conclusion.

C. *Workers' Compensation Exclusion*

The Supreme Court of Appeals seems to suggest that because Coffman was eligible for Workers' Compensation benefits, she was ineligible for protection under the Human Rights Act. The court noted that:

> [t]he intent of the legislature inherent in the enacting of the handicapped provisions of the West Virginia Human Rights Act was to assure equal opportunities for the handicapped in housing and employment. Thus, we cannot conclude that the legislature intended the handicapped provisions of the . . . Act as an alternative source of compensation for injuries sustained on the job (citation omitted).[100]

The dissent, however, said that it was "outrageously fallacious" for the court to imply that the Workers' Compensation Act precluded any recovery under the Human Rights Act.[101]

The purpose of Workers' Compensation benefits is to provide compensation for medical treatment and lost wages due to work-

96. *Id.* at 850.
97. *Id.* at 851.
98. *Id.*
99. *Coffman*, No. 17904 at 13.
100. *Id.* at 13-14 n.16.
101. *Id.* at 15 (Miller, J., dissenting).

related injuries,[102] as well as for impairment of earning capacity when the injury results in permanent disability.[103] By contrast, the Human Rights Act provides a cause of action for discrimination suffered by the handicapped person.[104] The dissent points out that the Act is consistent with W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because they have applied for Workers' Compensation benefits.[105]

Other state courts have addressed this combination of claims and held that it is not a double recovery.[106] *Reese v. Sears, Roebuck Co.*[107] involved the consolidation of two cases. Each case involved both work-related injuries for which compensation benefits were sought and allegations of discrimination under Washington's "Law Against Discrimination."[108] The court held that the plaintiffs did not receive a double recovery and that there was no bar to pursuing both claims. The employees had suffered two separate injuries.[109] The Workers' Compensation benefits were a remedy for the harm suffered by the injured employee (medical bills and lost wages),[110] and the discrimination act was a remedy for the subsequent injury of discriminatory discharge.[111] In the event that the employee's suit for discriminatory discharge was successful, any wage benefits received after the date of discharge for worker's compensation could be deducted from the amount of the discrimination award.[112] It should therefore not be necessary to elect to pursue only one of the claims, and the Supreme Court of Appeals should not assume that Workers'

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102. Cropp v. State Workmen's Compensation Comm'r, 160 W. Va. 621, 236 S.E.2d 480 (1977); Dunlap v. State Workmen's Compensation Comm'r, 160 W. Va. 58, 232 S.E.2d 343 (1977).

103. Posey v. State Workmen's Compensation Comm'r, 157 W. Va. 285, 201 S.E.2d 102 (1973).

104. *Coffman*, No. 17904 at 16-17. (Miller, J., dissenting).

105. *Id.* at 17 (Miller, J., dissenting).

106. *Id.* at 17-18 (Miller, J., dissenting) (citing Boscaglia v. Michigan Bell Telephone Co., 420 Mich. 308, 362 N.W.2d 642 (1984) (superseded by statute as stated in Eide v. Kelsey - Hayes Company, 431 Mich. 26, 27-30, 427 N.W.2d 488, 489-90 (1988)); Reese v. Sears, Roebuck & Co., 107 Wash. 2d 363, 731 P.2d 497 (1987); Jones v. Los Angeles Community College Dist., 198 Cal. App. 3d 794, 244 Cal. Rptr. 37 (1988).

107. *Reese.* 107 Wash. 2d 563, 731 P.2d 497 (1987).

108. *Id.* at 566-67, 731 P.2d at 499, 500.

109. *Id.* at 568-69, 731 P.2d at 501-502.

110. *Id.* at 568, 731 P.2d at 500-01.

111. *Id.* at 569-70, 731 P.2d at 501.

112. *Id.* at 574, 731 P.2d at 503.

Compensation will provide a safety net in handicapped discrimination cases.

V. CONCLUSION

In its three to two decision in *Coffman*, the West Virginia Supreme Court of Appeals gives the first interpretation of the West Virginia Human Rights Act as it applies to handicapped persons. The court narrowly interprets the Act and holds that an employee must be able to perform all the essential functions of a position with reasonable accommodation. This accommodation does not include a transfer.[113] Furthermore, the court assumes that Workers' Compensation should provide a safety net[114] and refuses to extend protection to workers who become disabled on the job. The courts, however, should not have viewed the receipt of Workers' Compensation benefits as a bar to a handicapped discrimination claim because the injury and the discharge are two separate harms. A more moderate standard is suggested under the regulations, which favor a stronger duty to accommodate an employee who becomes handicapped on the job.[115] A job reassignment requiring little or no retraining should be considered a reasonable accommodation rather than a transfer. This would allow disabled workers to overcome their acquired handicap and to remain self-supporting rather than being forced to rely on society for support. The Legislature enacted the Human Rights Act to open the door to gainful employment for the handicapped; the *Coffman* decision frustrates that intent.

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113. *Coffman*, No. 17904 at 13.
114. *Id.* at 13-14 n.16.
115. 77 C.S.R. 1 § 4.7 (1987).